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No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ANNE M. GORSUCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency has authority under the Clean Air Act to approve that portion of a revision to a state implementation plan which complies with all statutory requirements and to disapprove that portion of the revision which does not.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A36) is reported at 682 F.2d 626. The opinion of the district court (Pet. App. A37-A50) is reported at 509 F.Supp. 720.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1982 (Pet. App. A51). The petition for a writ of certiorari was filed September 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, as amended in 1970, Pub. L. No. 91-604, 84 Stat. 1976,[1] established a federal-state

[1]After the 1970 Amendments, the Act was codified at 42 U.S.C. (1976 ed.) 1857 *et seq.* In 1977, the Act was again amended and was recodified at 42 U.S.C. (Supp. I) 7401 *et seq.* Citations herein are to the present codification at Supplement I of 42 U.S.C. unless otherwise stated. The provisions of the Act relevant to this case were not materially changed by the 1977 Amendments.

partnership which recognized that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 7401(a)(3). The Act directed the Environmental Protection Agency ("EPA") to establish primary and secondary National Ambient Air Quality Standards ("NAAQS") for "each air pollutant for which air quality criteria have been issued." Section 109(a)(1)(A), 42 U.S.C. 7409(a)(1)(A).[2] The Act also required each state to adopt a state implementation plan ("SIP") imposing emission limitations upon sources of air pollution and containing such other measures as were necessary to ensure attainment and maintenance of the NAAQS by the statutory deadline. Sections 107(a) and 110(a), 42 U.S.C. 7407(a) and 7410(a). The Act directed each state to submit its SIP to the Administrator of EPA for approval or disapproval of "such plan, or any portion thereof." Section 110(a)(2), 42 U.S.C. 7410(a)(2).

The Administrator was required to approve the SIP if he found that it provided for timely attainment and maintenance of the NAAQS and otherwise complied with the Act's requirements. Section 110(a), 42 U.S.C. 7410(a). However, if the Administrator found that the SIP failed to comply with any of the Act's requirements, he was directed to disapprove those portions of the SIP that failed to comply and promulgate regulations to establish a lawful SIP for the state. Section 110(c)(1), 42 U.S.C. 7410(c)(1). The Act authorized each state to revise its SIP as necessary and empowered the Administrator to approve "any revision of an implementation plan" if the revised SIP would continue to ensure the attainment and maintenance of the NAAQS. Section 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A). Generally,

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[2]Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), hydrocarbons (HC), photochemical oxidants and lead. 40 C.F.R. Part 50.

once a SIP is approved, it remains effective until the Administrator approves a revision to the plan. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975).

2. Pursuant to this regulatory scheme, the State of Indiana submitted a SIP to EPA for approval in January 1972. That SIP contained a provision called Rule APC-3 ("1972 APC-3") entitled "Smoke and Other Visible Emissions" which imposed a limitation on smoke emissions from any combustion source of 40% opacity[3] with some limited exceptions. This provision was approved. See 37 Fed. Reg. 10842, 10864 (1972); 40 C.F.R. 52.773 and 52.776(c) (Pet. App. A122-A152).

In November 1974, Indiana rewrote Rule APC-3 ("1974 APC-3") and submitted it to EPA for approval as a SIP revision. The 1974 APC-3, entitled "Visible Emissions and Malfunctions," continued the 1972 APC-3's maximum opacity limitation of 40% (Pet. App. A94-A95),but it also created for the first time an exemption to the opacity limitation permitting a source to exceed the limitation for a total of 15 minutes each 24-hour period (*ibid.*).[4] On October 28, 1975, the Administrator approved most of the 1974 APC-3 as a revision to Indiana's SIP. 40 Fed. Reg. 50032 (Pet.

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[3]Opacity is defined in 40 C.F.R. 60.2 as "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." Opacity generally is measured by the so-called Ringelmann chart which is referred to in APC-3. The Ringelmann chart is defined in APC-1 as "[t]he chart published and described in the U.S. Bureau of Mines Information Circular 8333, and on which are illustrated graduated shades of gray to black for use in estimating the light obscuring power of smoke." 3 Ind. Admin. R. 325 IAC 1-1-2.

[4]The amended version also provided temporary exemptions from the opacity limitation for periods of start-up, soot-blowing, or malfunctions. It continued to equate violations of the opacity limitations with violations of the applicable particulate emission limitation (Pet. App. A94-A98).

App. A159-A165). However, the Administrator disapproved the 15-minute exemption period because Indiana had failed to demonstrate that this new exemption would not interfere with the attainment and maintenance of the NAAQS (*id.* at A159-A162).[5]

3. On January 7, 1980, EPA applied to the United States District Court for the Southern District of Indiana for warrants to inspect two electric generating stations owned by petitioner Public Service Company of Indiana, the Gibson Station in Gibson County, Indiana and the Wabash River Generating Station near Terre Haute, Indiana. The warrant applications were based upon EPA's broad statutory monitoring and inspection powers[6] and affidavits demonstrating probable cause to believe that the stations were in violation of APC-3 (Pet. 5-6; Pet. App. A5-A6,

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[5]In so doing, the agency found that the exemption appeared superfluous for power companies:

> New APC-3, the visible emission regulation, varies from the approved regulation in several respects, the most significant of which is the introduction of a 15-minute exemption period in each 24-hour period. The power companies submitted comments to the effect that such an exemption is necessary for them when starting fires or cleaning units. Since sections 2(a) and 2(b) of APC-3 already provide an exemption to visible emission requirements for fuel-burning sources in such circumstances, this comment appears to be superfluous.

(Pet. App. A161). In the courts below, petitioner contended (*id.* at A8, A45-A46) that EPA had not in fact approved the 1974 version of APC-3. Both courts rejected that argument (*id.* at A19-A22, A46) and petitioner has specifically stated that it is not seeking review on that issue (Pet. 5 n.3).

[6]Section 114(a)(2) of the Clean Air Act, 42 U.S.C. 7414(a)(2), grants to EPA's Administrator "or his authorized representative" the right to enter and inspect premises occupied by the owner or operator of an emission source. The petition does not challenge the constitutionality or applicability of this provision.

A42-A45).[7] The district court issued the two warrants. After the inspections had taken place, petitioner unsuccessfully moved to quash the warrants (*id.* at A6).

Petitioner then filed this action in the district court seeking declaratory and injunctive relief (Pet. App. A6). So far as relevant here, petitioner sought a declaratory judgment that the 1974 APC-3 was not enforceable because it was not part of the federally approved Indiana SIP. Petitioner argued that the Administrator had no statutory authority to approve only part of a SIP revision and that his approval of the 1974 APC-3 without the 15-minute exemption included by Indiana rendered the entire approval invalid (*id.* at A45-A47).[8] The district court, denying all relief, rejected this argument and held that the challenged actions of the EPA were proper (*id.* at A6, A41).

The Seventh Circuit affirmed. The court of appeals held that the Administrator's authority to approve SIP revisions was co-extensive with his authority to approve initial SIPs in general and that the Administrator's partial approval of the 1974 APC-3 was an appropriate exercise of that

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[7]Both applications recited concern over violations of APC-3 based upon continuous monitoring data submitted by petitioner to the Indiana Air Pollution Control Division (Pet. App. A44-A45). Warrants were sought after EPA inspectors at both facilities were denied admittance because they refused to sign a "Visitor's Admission Agreement" which contained a waiver of liability provision (*id.* at A5, A41-A42).

[8]Petitioner also sought (1) a declaratory judgment that the warrants were not supported by probable cause, authorized overly broad inspections, and authorized the seizure or demand of documents stored at locations other than those specifically authorized for inspection, and (2) injunctive relief preventing future inspections and enforcement actions resulting from information obtained pursuant to those warrants (Pet. App. A42). The court of appeals affirmed the district court's disposition of these issues against petitioner (*id.* at A26).

authority (Pet. App. A13-A19).[9] At the outset of its discussion of petitioner's argument, the court of appeals noted that EPA's construction of the Clean Air Act was entitled to considerable deference (*id.* at A13). See *Train* v. *Natural Resources Defense Council, Inc., supra,* 421 U.S. at 87. The court of appeals found that the purpose of the Administrator's approval power over the inital SIPs and SIP revisions was identical: "to ensure that the state's SIPs comply with the minimum requirements of [Section 110(a)(2)(A)-(K)] 42 U.S.C. § 7410(a)(2)(A)-(K)" (Pet. App. A14). The court then noted that, while Section 110(a)(2) authorizes the Administrator to approve or disapprove the original SIP "or any portion thereof" and Section 110(a)(3) authorizes approval simply of any "revision," the two provisions could be read consistently.

Applying this Court's definition of the term "revision" in *Train, supra,* 421 U.S. at 89, as "a change in the plan itself which deletes or modifies [a] requirement," the court of appeals held that Section 110(a)(3) authorizes the Administrator to approve or disapprove any change in a SIP which differs from the original SIP (Pet. App. at A14). The court of appeals found that this reading of the statute was consistent with the purpose of the approval process, that is, to

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[9]In the court of appeals, EPA contended that petitioner's challenge to EPA's partial approval authority was time-barred and was brought in the wrong federal court (Appellee's Br. 35-37). Section 307(b) of the Clean Air Act, 42 U.S.C. 7607(b), as it existed in 1975, required that challenges to the Administrator's approval of a SIP revision be made by petitioning the appropriate court of appeals within 30 days of the action in question. Because of Section 307(b)'s time bar and its designation of the court of appeals as the initial forum for judicial review, EPA contended that district court jurisdiction was wholly lacking in this case. The Seventh Circuit agreed that "issues relating to the Administrator's rationale for partially approving the 1974 APC-3" were time-barred (Pet. App. A22-A23 & n.17), but held that it did have jurisdiction to consider "the general issue of the Administrator's power to partially approve a revision" (*id.* at 23 n.17).

ensure the ongoing attainment and maintenance of the NAAQS (*id.* at A14-A15). The court rejected petitioner's argument that the Administrator's authority should be limited to verbatim approval of revisions to SIPs, finding that it "would elevate form over substance" to limit the Administrator to approving or disapproving the entire revision to a SIP when only one portion of the revision was inconsistent with the Act's requirements (*id.* at A14-A15).[10]

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with the decisions of this Court or any other court of appeals, and does not warrant further review.

1. Petitioner suggests (Pet. 7-12) that the decision below conflicts with this Court's decisions in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and

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[10]In reaching this result, the court of appeals rejected petitioner's argument that partial approval would permit the Administrator to approve something not actually adopted by the state. The court noted (Pet. App. A16) that the Administrator "is clearly permitted by [Section 110(a)(2),] 42 U.S.C. § 7410(a)(2)" to approve portions of the original SIP and that "[a]ppellant has provided no reason why regulations should be severable for approval purposes when submitted as part of the original SIP but not when they are submitted as revisions to the SIP" (Pet. App. A16). The court noted further (*id.* at A15-A16) that the cases cited by petitioner in support of its contrary proposition, *Citizens for a Better Environment* v. *EPA*, 649 F.2d 522 (7th Cir. 1981); *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981); *Sierra Club* v. *Indiana & Michigan Electric Corp.*, No. NA 81-8-C (S.D. Ind. June 5, 1981); *Sierra Club*, v. *Indiana Kentucky Electric Corp.*, No. NA 81-7-C (S.D. Ind. May 11, 1981), were inapposite because they simply held that EPA cannot approve state regulations which were improperly promulgated by the state and therefore invalid when submitted to the agency.

In addition, the court of appeals rejected petitioner's reliance upon *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated, 431 U.S. 99 (1977). The court found that the holding in that case that the EPA is not authorized to require the states to submit an adequate SIP or additional provisions thereto was not relevant to this case (Pet. App. A16-A18).

Union Electric Co. v. *EPA*, 427 U.S. 246 (1976). Petitioner correctly notes that the Court found in those cases that Congress intended, in adopting the Clean Air Act, to grant the states primary authority to choose their own "mix of limitations" subject to the condition that the mix would be sufficient to achieve minimum national air quality standards.[11] However, contrary to petitioner's assertion (Pet. 7, 12), that principle was not violated here. The court of appeals decided only that the Administrator's authority to act upon SIP revisions under Section 110(a)(3) is coextensive with his authority to act upon initial SIPs under Section 110(a)(2). In so deciding, the court below gave appropriate deference to the Administrator's interpretation of the statute as permitting him to "approve or disapprove" each revision or "each portion thereof" as required by *Train, supra*, 421 U.S. at 87. Indeed, it would be difficult to endorse the anomalous interpretation of the Act urged by petitioner, which would permit the Administrator to approve or disapprove "each portion" of the initial SIP under Section 110(a)(2), but deny the Administrator this same power in the case of SIP revisions submitted under Section 110(a)(3).

The record shows that in 1974 Indiana exercised its primary responsibility under the Act by adopting a revision to Rule APC-3 of its initial SIP provision in 1974 (Pet. App. A7, A94-A95). That revision was submitted to EPA for review to determine its consistency with the requirements of Section 110(a) for the timely attainment and maintenance of the NAAQS. The Administrator approved the 1974 APC-3 with the exception of the 15-minute exemption provision because he found that the exemption could interfere with the attainment and maintenance of air quality standards

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[11] *Train, supra*, 421 U.S. at 79, 86-87; *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 267, 269.

and that Indiana had not demonstrated the contrary as required by EPA regulations (*id.* at A19-A22, A159-A165).[12] As the court of appeals held, that action is consistent with the Administrator's authority under the Act and does not conflict with *Train's* allocation of roles between the states and EPA.[13]

The court of appeals also was correct in rejecting petitioner's contention that the Administrator's disapproval of the 15-minute exemption in the 1974 APC-3 required EPA to reject the 1974 APC-3 in its entirety and instead promulgate a federal regulation under Section 110(c)(1) of the Act affirmatively adopting the acceptable portions of the 1974 APC-3. The court of appeals found that this procedure would serve no purpose here, where the partially approved revision was completely satisfactory and a substitute federal regulation thus would be superfluous (Pet. App. A17). As

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[12]Petitioner erroneously contends that no public hearings were held on "EPA's resulting more stringent regulation, restricting all emissions in excess of 40% opacity" (Pet. 5). The record indicates otherwise. Public hearings were held for both the original 1972 APC-3 (Pet. App. A93) and for the 1974 APC-3 (*id.* at A153), both of which contained this standard.

[13]As a factual matter, petitioner is mistaken in its assertion that the Administrator's disapproval of 1974 APC-3's 15-minute exemption altered Indiana's choice of its "mix" of emission limitations (Pet. 8-11). In substance, the 1974 APC-3 strengthened the 1972 APC-3 by expanding its coverage to all "visible emissions" instead of "smoke" alone, and by extending the 1972 APC-3 to "any equipment" rather than simply "any combustion installation" (Pet. App. A94, A-95). At the same time, the 1974 APC-3 weakened the 1972 APC-3 by creating the 15-minute exemption for emissions (*id.* at A95). The 15-minute exemption was defended as necessary to permit power companies to start fires and clean units (*id.* at A161). As the Administrator found, however, other provisions of the 1974 APC-3 already addressed these concerns (*ibid.*). Consequently, the Administrator's disapproval of the 15-minute exemption did not alter Indiana's articulated "mix" of emissions limitations in any relevant way.

the court found, the approach followed here was no different from the Administrator's unquestioned power to partially approve initial SIPs (*id.* at A18 & n.12).[14]

2. The court of appeals also held that judicial review of the merits of the Administrator's disapproval of the 15-minute exemption was time-barred in 1975 by the then-applicable 30-day deadline of Section 307(b) of the Act (42 U.S.C. 1857h-5(b)).[15] However, the court concluded that it possessed sufficient jurisdiction to determine the threshold issue whether EPA could partially approve a SIP revision, a question it resolved in EPA's favor (Pet. App. A13-A19). Petitioner contends (Pet. 20-22) that the court erred in applying the Section 307(b) 30-day deadline to bar further review because partial approval is not final agency action. The same claim was raised below and rejected in a factual finding (Pet. App. A19-A22, A46) that EPA clearly identified its partial approval as final action subject to Section 307(b)'s jurisdictional time bar.[16] Further review of this

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[14]Moreover, as petitioner concedes elsewhere (Pet. 17 n.15, 18), it is clear that Section 110(c)(1) does not apply to SIP revisions such as the 1974 APC-3 that a state submits voluntarily. Section 110(c)(1) applies only (a) when a state does not submit an initial SIP at all, (b) where the initial SIP does not meet the Act's requirements, and (c) where the Administrator notifies the state that its SIP is substantially inadequate and the state fails to file a revised SIP. 42 U.S.C. 7410(c)(1)(A)-(C).

[15]This deadline was extended by Congress to 60 days in 1977. However, petitioner is time-barred under the extended deadline as well. Compare 42 U.S.C. (1976 ed.) 1857h-5(b) and 42 U.S.C. (Supp. I) 7607(b).

[16]The court distinguished (Pet. App. A23-A26) *Utah International, Inc.* v. *EPA*, 478 F.2d 126 (10th Cir. 1973), upon which petitioner continues to rely, as a case in which petitioners sought review of an EPA order proposing new regulations to replace disapproved portions of a state SIP. The Tenth Circuit dismissed the petition because it did not challenge a final agency action. The Seventh Circuit found that, unlike the proposed order in that case, the action here was plainly a final order of the agency (Pet. App. A24). That decision is correct, and petitioner has stated that it is not challenging the factual decision that the order was final (*id.* at 5 n.3).

fact-bound jurisdictional determination is thus unwarranted. Nevertheless, EPA adheres to its previous position (see note 9, *supra*) that the time bar of Section 307(b) totally deprived the courts below of subject matter jurisdiction in every respect. See *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884), quoted in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, No. 81-440 (June 1, 1982), slip op. 8.

3. Finally, the petition raises no issue of national importance justifying a grant of certiorari. Petitioner describes the decision below as permitting EPA to utilize a "blue-pencil" approach to the approval of SIP revisions adopting any bits and pieces of revisions which it likes and dropping those which it does not like (Pet. 13-14). This is a gross mischaracterization. The decision merely holds that the Administrator's authority to approve revised SIPs coincides with his authority to approve initial SIPs. The Administrator must approve both if they meet the attainment and maintenance requirements of Section 110. Sections 110(a)(2)-(3), 42 U.S.C. 7410(a)(2)-(3). The decision below does not alter this objective test.

Petitioner insists (Pet. 11-12) nonetheless that this test is insufficient to protect the rights of the State of Indiana because it permits EPA, rather than Indiana, to choose "the proper mix of emissions limitations." Leaving to one side the validity of this argument as a factual matter, see note 13, *supra*, we stress that the State of Indiana did not object in 1975 to the Administrator's partial approval of the 1974 APC-3, nor did it seek judicial review of the action. Only in this Court has Indiana's Air Pollution Control Board indicated a desire to participate, and even then only in the limited capacity of *amicus curiae*, not as an intervenor

testing a claimed right.[17] Petitioner, which is not authorized by Indiana's governor or its attorney general to speak on behalf of the State, has been and remains the sole challenger of the Administrator's partial approval of the 1974 APC-3. Under these circumstances, petitioner does not have standing to argue that the rights of the State of Indiana have been violated. *Mountain States Legal Foundation* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980); *Pacific Legal Foundation* v. *Gorsuch*, Nos. 81-4442 and 81-7060 (9th Cir. Oct. 20, 1982). Aside from these problems, the facts petitioner relies upon simply show that Indiana is in the process of revising APC-3 again (Pet. 5 & n.4; Pet. App. A98, A178, A195-200, A112, A244, A251-252). This ongoing revision is expressly provided for by the statute. Section 110(a)(3), 42 U.S.C. 7410(a)(3).

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[17]The Indiana Air Pollution Control Board has moved pursuant to Rule 36.4 of this Court for leave to file an *amicus curiae* brief in support of the petition. Respondent does not object to the filing of this brief. It bears emphasis, however, that this marks the first time that the Board has seen fit to announce to any court its objections to the legality of EPA's partial disapproval of the 1974 APC-3 seven years ago. And, as the Board admits (Amicus Br. 4-5), it has since submitted two revisions of APC-3 for EPA's approval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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